



**6714-01-P**

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Part 360**

**RIN 3064-AE32**

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**Treatment of Financial Assets Transferred in Connection with a Securitization or Participation**

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Final rule.

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**SUMMARY:** The Federal Deposit Insurance Corporation (the “FDIC”) is issuing a final rule (the “Final Rule”) that revises certain provisions of its securitization safe harbor rule, which relates to the treatment of financial assets transferred in connection with a securitization or participation, in order to clarify the requirements of the securitization safe harbor as to the retention of an economic interest in the credit risk of securitized financial assets in connection with the effectiveness of the credit risk retention regulations adopted under Section 15G of the Securities Exchange Act.

**DATES:** Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Phillip E. Sloan, Counsel, Legal Division (703) 562-6137; or George H. Williamson, Manager, Division of Resolutions and Receiverships (571) 858-8199.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Federal Deposit Insurance Corporation (FDIC), in regulations codified at 12 CFR 360.6 (the Securitization Safe Harbor Rule), set forth criteria under which in its capacity as receiver or conservator of an insured depository institution the FDIC will not, in the exercise of its authority to repudiate contracts, recover or reclaim financial assets transferred in connection with securitization transactions. Asset transfers that, under the Securitization Safe Harbor Rule, are not subject to recovery or reclamation through the exercise of the FDIC's repudiation authority include those that pertain to certain grandfathered transactions, such as, for example, asset transfers made prior to December 31, 2010 that satisfied the conditions (except for the legal isolation condition addressed by the Securitization Safe Harbor Rule) for sale accounting treatment under generally accepted accounting principles (GAAP) in effect for reporting periods prior to November 15, 2009 and that pertain to a securitization transaction that satisfied certain other requirements. In addition, the Securitization Safe Harbor Rule provides that asset transfers that are not grandfathered, but that satisfy the conditions (except for the legal isolation condition addressed by the Securitization Safe Harbor Rule) for sale accounting treatment under GAAP in effect for reporting periods after November 15, 2009 and that pertain to a securitization transaction that satisfies all other conditions of the Securitization Safe Harbor Rule (such asset transfers, together with grandfathered asset

transfers, are referred to collectively as Safe Harbor Transfers) will not be subject to FDIC recovery or reclamation actions through the exercise of the FDIC's repudiation authority. For any securitization transaction in respect of which transfers of financial assets do not qualify as Safe Harbor Transfers but which transaction satisfies all of its other requirements, the Securitization Safe Harbor Rule provides that, in the event the FDIC as receiver or conservator remains in monetary default for a specified period under a securitization due to its failure to pay or apply collections or repudiates the securitization asset transfer agreement and does not pay damages within a specified period, certain remedies can be exercised on an expedited basis.

Paragraph (b)(5)(i) of the Securitization Safe Harbor Rule sets forth the conditions relating to credit risk retention that apply to transfers of financial assets in connection with securitizations that are not grandfathered by the Securitization Safe Harbor Rule. Under paragraph (b)(5)(i)(A) of the Securitization Safe Harbor Rule as currently in effect, prior to the effective date of regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.* ("Section 15G"), the documents governing such securitization must require that the sponsor retain an economic interest in not less than five (5) percent of the credit risk of the financial assets relating to the securitization. The requirement in paragraph (b)(5)(i)(A) of the Securitization Safe Harbor Rule, that *the documents* require retention of an economic interest, is consistent with many other provisions of the Securitization Safe Harbor Rule, which are similarly expressed as requirements for the securitization documentation, rather than as conditions requiring actual compliance with the provision that is required to be included in the documentation. As currently in effect, paragraph (b)(5)(i)(B) of the Securitization Safe

Harbor Rule does not explicitly refer to the securitization documentation, but provides that, upon the effective date of the regulations required under Section 15G (the Section 15G Regulations), such regulations shall exclusively govern the requirement to retain an economic interest in the credit risk of the financial assets.

Section 15G provides that regulations issued thereunder become effective with respect to residential mortgage securitizations one year after the date on which the regulations are published in the Federal Register and, with respect to all other securitizations, two years after such publication date. The Section 15G Regulations were published in the Federal Register at 79 FR 77602 on December 24, 2014. The Federal Register publication of the Section 15G Regulations specifies “compliance dates” that correspond to these effective dates. However, the Federal Register publication also specifies February 23, 2015 as the “effective date” of the Section 15G Regulations in accordance with Federal Register editorial conventions, which require that a Federal Register publication specify as the effective date the date on which a rule affects the current Code of Federal Regulations.<sup>1</sup>

In connection with the notice of proposed rulemaking relating to the Section 15G Regulations, FDIC staff received a comment that suggested that certain other points relating to paragraph (b)(5)(i)(B) of the Securitization Safe Harbor Rule should be clarified.

On January 30, 2015, the FDIC published a notice of proposed rulemaking relating to the Securitization Safe Harbor Rule (the “NPR”). The NPR was designed, in part, to

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<sup>1</sup> See 79 FR 77602 (December 24, 2014).

eliminate any confusion that might be created by the use of “effective date” in the Section 15G Regulations Federal Register publication and to clarify when compliance with paragraph (b)(5)(i)(B) of the Securitization Safe Harbor Rule is required. In addition, the NPR included a proposed rule (the Proposed Rule) that addressed two of the points raised by the commenter.<sup>2</sup> The first is a clarification that paragraph (b)(5)(i)(B) was intended to require that, upon and following the applicable effective date under the Section 15G Regulations (such applicable effective dates (December 24, 2015 for residential mortgage securitizations and December 24, 2016 for all other securitizations) are referred to as the applicable compliance dates), the Securitization Safe Harbor Rule requirements as to risk retention are satisfied if the governing documents of a securitization transaction require retention of an economic interest in the financial assets in accordance with the Section 15G Regulations, and that if the documentation satisfies this condition (and assuming all other conditions of the Securitization Safe Harbor Rule are satisfied), the transaction will not lose the benefits of the safe harbor solely on the basis of any non-compliance with the Section 15G Regulations risk retention requirements.

The second is a clarification that paragraph (b)(5)(i)(B) of the Securitization Safe Harbor Rule does not require that any action be taken with respect to issuances of asset-backed securities that close prior to the applicable compliance date of the Section 15G Regulations.

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<sup>2</sup> 80 FR 5076 (January 30, 2015).

These two clarifications, which were included in the Proposed Rule, together with an additional change suggested by a comment letter relating to the Proposed Rule, are included in the Final Rule.

## **II. Comment Received on the Proposed Rule**

The FDIC received one comment letter, from an industry trade association, in response to the Proposed Rule. This letter supported the changes included in the Proposed Rule and requested that the Final Rule include one additional change relating to the credit risk retention condition of the Securitization Safe Harbor Rule. The commenter referred to the applicable compliance dates for the Section 15G Regulations and proposed that the Final Rule provide securitization sponsors the option, with respect to a securitization transaction, to comply with the credit risk retention condition of the Securitization Safe Harbor Rule by adopting the Section 15G risk retention requirements during the period preceding the applicable compliance date for such transaction, even though the Section 15G Regulations do not require such compliance before such applicable compliance date. The commenter stated that providing such optionality “would effectuate the principle underlying the credit risk retention condition of the Securitization Safe Harbor Rule.”<sup>3</sup>

## **III. Policy Objective**

The policy objective underlying the Final Rule is to create certainty and eliminate unnecessary burdens in connection with the transition to the Section 15G Regulations requirements as to credit risk retention.

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<sup>3</sup> Letter dated March 30, 2015, p. 3.

#### **IV. The Final Rule**

##### Overview

The Final Rule clarifies that the Securitization Safe Harbor Rule condition relating to credit risk retention requires that the documents governing a securitization transaction that closes on or after the applicable compliance date under the Section 15G Regulations must require that an economic interest in the credit risk of the financial assets is retained in accordance with the Section 15G Regulations. The Final Rule provision effecting this clarification also makes clear that the migration of the Securitization Safe Harbor Rule to the Section 15G Regulations governing credit risk retention will not require changes to documents governing securitizations that closed prior to the applicable compliance date. The provision also makes clear that the transition to the Section 15G standard is a documentation requirement and, thus, does not put investors at risk if a securitization sponsor, in violation of transaction documents, does not retain credit risk in accordance with the Section 15G Regulations.

Because securitization investors have relied on the Securitization Safe Harbor Rule to obtain an understanding of how the FDIC might exercise its powers if it is appointed receiver or conservator for an insured depository institution which transferred assets in connection with a securitization transaction, the FDIC believes that it is important to make clear to securitization market participants the date upon and after which the Securitization Safe Harbor will require reference to the Section 15G Regulations. In addition, the FDIC wants to eliminate possible confusion among market participants as to whether an asset-backed security issuance that complies with all requirements of the

Securitization Safe Harbor Rule could forfeit the benefits afforded by the Securitization Safe Harbor Rule based on the action or inaction of a securitization sponsor or other party with respect to retention of credit risk following the date of such issuance. This is different from the Section 15G Regulations, under which non-compliance with the credit risk retention requirements will constitute a violation of the Regulations.

Consistent with the clarifications to the process for migration to the Section 15G Regulations included in the Proposed Rule, the Final Rule follows the commenter's suggestion and permits securitization sponsors to comply with the credit risk retention requirements of the Securitization Safe Harbor Rule by opting in the securitization's governing documents to require compliance with the Section 15G Regulations earlier than required by the Section 15G Regulations. It is the FDIC's view that since the Securitization Safe Harbor Rule has always required the transition to the Section 15G risk retention requirements, there is no compelling reason to require that securitization sponsors await the applicable compliance date in order to use one of the risk retention methods available under the Section 15G Regulations. In following the commenter's proposal, the FDIC wished to avoid imposing unnecessary burdens on sponsors that otherwise might need to establish a securitization structure for the issuance of multiple series before the applicable compliance date and then need to amend the structure after the applicable compliance date. The FDIC sees no reason to require such extra expense. The FDIC recognizes that permitting securitization sponsors to cause a securitization transaction to comply with the Securitization Safe Harbor Rule by exercising an option to require compliance with the Section 15G Regulations before the applicable compliance date also has the effect of allowing greater flexibility with respect to risk retention for



purposes of complying with the Securitization Safe Harbor Rule, and in some cases may permit sponsors to benefit from exemptions available under the Section 15G Regulations earlier than otherwise would be the case for purposes of the Securitization Safe Harbor Rule. In promulgating the Section 15G Regulations, the FDIC determined that the approach to risk retention adopted by those rules is effective and appropriate and, thus, the option of early adoption also is appropriate.

Section-by-section analysis.

*Definitions*

The Final Rule adds a new definition, “applicable compliance date” to paragraph (a) of the Securitization Safe Harbor Rule. This definition reflects that the Section 15G Regulations impose two dates for compliance: December 24, 2015 for securitization of residential mortgages, and December 24, 2016 for all other securitizations.

*Paragraph (b)(5)(i)*

The Final Rule revises paragraph (b)(5)(i) of the Securitization Safe Harbor Rule to make the following three points clear:

- (i) In order to qualify for the benefits of the Securitization Safe Harbor Rule, the documents governing the issuance of asset-backed securities in a securitization transaction must require retention of an economic interest in the credit risk of the financial assets relating to the securitization transaction in compliance with the Section 15G Regulations if such issuance occurs upon or following the date on which compliance with Section 15G is required for such type of securitization transaction;

- (ii) The Securitization Safe Harbor Rule does not require inquiry as to whether the sponsor or other applicable party in fact complies with the risk retention requirements of the documentation; and
- (iii) The Securitization Safe Harbor Rule requirements as to the Section 15G Regulations do not require changes to securitization documents governing asset-backed security issuances that are closed prior to the applicable compliance date under the Section 15G Regulations.

In addition, the Final Rule revises paragraph (b)(5)(i) of the Securitization Safe Harbor Rule to permit a securitization transaction, that closes between the date of the publication of the Final Rule in the Federal Register and the applicable compliance date related to such securitization transaction, to comply with the paragraph if the documents creating the securitization require retention of an economic interest in the credit risk of the financial assets in accordance with the requirements of the Section 15G Regulations as though such Regulations were then in effect. In the case of a securitization transaction of an entity established to issue obligations in more than one securitization transaction, the election to require in the documents creating the securitization transaction that risk be retained in accordance with the Section 15G Regulations can be set forth either in the specific securitization transaction documents or, provided that it governs the securitization transaction, in one of the documents establishing or otherwise governing the issuing entity.

## **V. Regulatory Analysis and Procedure**

### **A. Paperwork Reduction Act**

This rule would entail an information collection for sponsors that exercise the option to become subject to the Section 15G Regulations earlier than otherwise required. Because the information to be collected is the same, however, as that encompassed by the collection of information that was approved under OMB No. 3064-0183, no new submission is being made to OMB with respect to the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*).<sup>4</sup>

## **B. Regulatory Flexibility Act**

The Regulatory Flexibility Act 5 U.S.C. § 601, *et seq.* (RFA) requires each federal agency to prepare a final regulatory flexibility analysis in connection with the promulgation of a final rule, or certify that the final rule will not have a significant economic impact on a substantial number of small entities.<sup>5</sup> Pursuant to section 605(b) of the Regulatory Flexibility Act, the FDIC certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities.

## **C. Small Business Regulatory Enforcement Act**

The Office of Management and Budget has determined that the Final Rule is Not a “major rule” within the meaning of the Small Business Regulatory

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<sup>4</sup> The specific method of defining the respondent population differed in some respects for purposes of the FDIC’s Section 15G PRA submission, OMB No. 3064-0183. The respondent population for that submission was based on an allocation to the bank regulatory agencies based on the number of sponsors regulated by them, with the remainder of sponsors allocated to the Securities and Exchange Commission. The allocation to the bank regulatory agencies was then divided among the FDIC and the other bank regulatory agencies. The respondents for purposes of this Rule are IDIs that are projected to sponsor securitizations and elect to comply early with the Section 15G Regulations, and the number of responses is based on the projected number of securitizations for which those sponsors would be expected to elect the early compliance option.

<sup>5</sup> See 5 U.S.C. 603, 604 and 605.

Enforcement Fairness Act of 1996 (SBREFA), (5 U.S.C. 801 *et seq.*). As required by the SBREFA, the FDIC will file the appropriate reports with Congress and the Government Accountability Office so that the Final Rule may be reviewed.

#### **D. Plain Language**

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat.1338, 1471), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the Final Rule in a simple and straightforward manner.

#### **List of Subjects in 12 CFR Part 360**

Banks, Banking, Bank deposit insurance, Holding companies, National banks, Participations, Reporting and recordkeeping requirements, Savings associations, Securitizations.

■ For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation amends 12 CFR Part 360 as follows:

#### **PART 360—RESOLUTION AND RECEIVERSHIP RULES**

1. The authority citation for part 360 continues to read as follows:

**Authority:** 12 U.S.C. 1817(b), 1818(a)(2), 1818(t), 1819(a) Seventh, Ninth and Tenth, 1820(b)(3), (4), 1821(d)(1), 1821(d)(10)(c), 1821(d)(11), 1821(d)(15)(D), 1821(e)(1), 1821(e)(8)(D)(i), 1823(c)(4), 1823(e)(2); Sec. 401(h), Pub. L. 101-73, 103 Stat. 357.

2. Amend § 360.6 as follows:

a. Redesignate paragraphs (a)(1) through (11) as (a)(2) through (12) and add a new paragraph (a)(1).

b. Revise paragraph (b)(5)(i).

The addition and revision read as follows:

**§360.6 Treatment of financial assets transferred in connection with a securitization or participation.**

(a) \* \* \*

(1) *Applicable compliance date* means, with respect to a securitization, the date on which compliance with Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act is required with respect to that securitization.

\* \* \* \* \*

(b) \* \* \*

(5) \* \* \*

(i) *Requirements applicable to all securitizations.* (A) Prior to the applicable compliance date for regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the documents creating the securitization shall require that the sponsor retain an economic interest in a material portion, defined as not less than five (5) percent, of the credit risk of the financial assets. This retained interest may be either in the form of an interest of not less than five (5) percent in each of the credit tranches sold or transferred to the investors or in a representative sample of the securitized financial assets equal to not less than five

(5) percent of the principal amount of the financial assets at transfer. This retained interest may not be sold, pledged or hedged, except for the hedging of interest rate or currency risk, during the term of the securitization.

(B) For any securitization that closes upon or following the applicable compliance date for regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the documents creating the securitization shall instead require retention of an economic interest in the credit risk of the financial assets in accordance with such regulations, including the restrictions on sale, pledging and hedging set forth therein.

(C) Notwithstanding paragraph (b)(5)(i)(A) of this section, for any securitization that closes following \_\_\_\_\_ [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER] and prior to the applicable compliance date for regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, at the option of the sponsor, the requirements of paragraph (b)(5)(i)(B) of this section may be satisfied if (in lieu of the requirement set forth in paragraph (b)(5)(i)(A) of this section) the documents creating the securitization require retention of an economic interest in the credit risk of the financial assets in accordance with the requirements of the Section 15G regulations as though such regulations were then in effect.

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Dated at Washington, D.C., this 22<sup>nd</sup> day of October, 2015.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

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Robert E. Feldman,  
Executive Secretary

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